United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1460

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

DOCKET NO. 76-1460

UNITED STATES OF AMERICA,

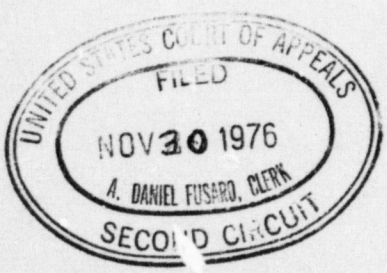
APPELLEE,

V.

JESUS ORTIZ,

APPELLANT.

BRIEF OF APPELLANT
JESUS ORTIZ



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STATEMENT OF THE CASE

On March 25, 1976, a Federal grand jury sitting in Hartford, Connecticut, returned a three-count indictment charging Jesus Ortiz and Enrique Melendez with conspiring to distribute a controlled substance, possessing a controlled substance with intent to distribute it, and distribution of the substance. Title 21, United States Code, Sections 846 and 841(a)(1).

On July 9, 1976 (App. 7), Defendant Ortiz moved to prohibit the use of his 1972 conviction for sale of heroin for impeachment purposes. On July 12, 1976, the Court denied this motion. Defendant renewed his motion at the close of the government's case (App. 83).

On July 27, 1976, the Court granted the government's request to sever the case of the co-defendant Melendez from that of defendant. On the same date, with The Honorable T. Emmet Clarie, Chief Judge for the United States District Court for the District of Connecticut, presiding, a jury trial was held in Hartford, Connecticut.

Testimony was completed on July 27, 1976, and summations of counsel and the charge to the jury were completed on July 28, 1976. At 2:48 p.m. on July 28, 1976, the jury returned a verdict of guilty on all three counts. On September 27, 1976, the Court sentenced Ortiz to concurrent terms of seven years on each of the three counts in addition to a special parole term of three years.

Essentially the case against the defendant rested entirely on the testimony of an informant, Luis Lopez. Lopez simply testified that on February 10, 1976, he and an undercover agent, Rafael Valentin, went to 15 Cabot Street in Hartford for the purpose of purchasing drugs (App. 63-83). While Valentin waited outside the three-story building, Lopez went inside and negotiated a purchase of cocaine with the co-defendant, Enrique "Kiki" Melendez, on the second floor.

Lopez then proceeded to the third-floor apartment of the defendant where he purchased cocaine from the defendant, whom he knew as "Chombo," and from Kiki Melendez. He was in the building no more than five minutes (App. 62). Before proceeding to the third floor of the building, he had never seen Ortiz (other than a few unspecified encounters on the street) or heard his name mentioned by anyone as a source of cocaine. Agent Valentin could only testify that on February 10, 1976, Lopez went into the building without any drugs on his person and came out with a quantity of cocaine (App. 60). Valentin had no personal knowledge of what transpired when Lopez went inside and never saw Ortiz or heard him speak on that day or any other day (App. 61-62).

Over the objection of defense counsel, both Agent Valentin and the informer Lopez testified on direct examination to statements made by Kiki Melendez on February 9, 1976 (App. 48-51, 56-59, 69-72). These statements pertained to the obtaining of drugs by Melendez and Melendez's reluctance to deal with

Valentin. Though defense counsel argued that these hearsay statements were not made during the course of the conspiracy, the Court allowed them in based upon the government's assertion that it would connect them up to the conspiracy at a subsequent point in the trial (App. 51). When, in the opinion of defense counsel, the connecting up was not accomplished, defendant moved to strike the hearsay statements of February 9, 1976. This motion was denied (App. 85-86).

Furthermore the Court instructed the jury on the co-conspirator exception to the hearsay rule following the testimony of the February 9 statements of Melendez by Lopez and Valentin (App. 52-53). In this cautionary instruction, the Court did not mention that there must be a conspiracy and it must be established by a "fair preponderance of the evidence" before the hearsay statements of a co-conspirator can be admitted. The defendant took exception to this instruction and stated his reasons.

ARGUMENT

I. THE COURT ERRED IN ALLOWING THE WITNESSES LOPEZ AND VALENTIN TO TESTIFY CONCERNING THE PRE-CONSPIRACY HEARSAY STATEMENTS OF THE CO-CONSPIRATOR MELENDEZ OF FEBRUARY 9, 1976.

It has been long established that a statement made by a co-conspirator during the course of a conspiracy in furtherance of the conspiracy is admissible as an exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E).[1/] United States v. Wiley, 519 F.2d 1348 (2d Cir. 1975); United States v. Nixon, 418 U.S. 683, 701 (1974); United States v. Puco, 476 F.2d 1099 (2d Cir.), cert. denied, 414 U.S. 844 (1973). For a statement of a co-conspirator to be made in the course of a conspiracy, it must be made after the conspiracy is formed and before it is terminated. Any hearsay statement made at any other time, even if made by a co-conspirator, would be inadmissible unless falling into some other hearsay rule exception. Fed. R. Evid. 802.

Defendant contends that Kiki Melendez's out-of-court statements of February 9, 1976, were inadmissible since they were made prior to the formation of a conspiracy. As in almost any conspiracy concerning drug sales, there is no formal agreement between the parties and perhaps no definite point in time

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[1/] The Federal Rules of Evidence no longer treat statements of co-conspirators as exceptions to the rule, but simply describe them as non-hearsay.

when they agree to engage in the illicit activity. However, unless the government can show by a "fair preponderance of the evidence" that a conspiracy, involving the Defendant Ortiz, existed on February 9, 1976, such hearsay statements should be inadmissible. United States v. Projansky, 465 F.2d 123 (2d Cir. 1972); United States v. Zane, 495 F.2d 683 (2d Cir.), cert. denied, 419 U.S. 895 (1974); United States v. Cohen, 489 F.2d 945 (2d Cir. 1973).

Not only is the evidence of a conspiracy beginning on February 9, 1976, lacking, but the testimony of Valentin points to no conspiracy on that date. Kiki Melendez on February 9, in response to Valentin's request for a quarter piece of coke, does not say Ortiz has it or a friend can get it, but that "Frankie [his brother "Frankie" Melendez] has sold a piece in the morning and had the rest under lock and key" (App. 56). Later that day, Kiki again tells Lopez, in Valentin's presence, that he will sell cocaine, but never mentions that the defendant or any other party is involved with him (App. 58, 69-70). Furthermore, the indictment makes no mention of any overt acts on February 9, 1976, but only refers to acts of the co-conspirator on February 10, 1976 (App. 5).

In a case similar to the present case, the Fourth Circuit found reversible error when a trial court allowed in evidence of a co-conspirator's out-of-court statement and activities without any independent proof of a conspiracy at the time the statement was made. United States v. Vaught, 485 F.2d 320 (4th Cir. 1973). The co-defendant in Vaught made an out-of-

court statement implicating other people in a drug sale in December. Except for this statement, there was no evidence connecting defendant to a drug sale in December. Further evidence established that in January the defendant did sell drugs and conspired with his co-defendant to effect this sale. Contrary to the government's assertions, however, evidence of the conspiracy's existence in December was never produced. The Fourth Circuit held that,

> [I]n a prosecution for conspiracy the acts and words of an alleged co-conspirator prior to the actual formation and existence of a conspiracy are totally irrelevant and should be struck from the record. United States v. Vaught, supra at 323.

It should be pointed out that although the December statements were hearsay as to Vaught, Vaught's name was never mentioned by his alleged co-conspirator nor was he referred to in any way at that time. Although Vaught failed to move to strike the out-of-court statements, the court held that their admission was plain error. United States v. Vaught, supra at 323, n.3.

Similarly, in the present case, there was no mention of the defendant in Melendez's out-of-court statements on February 9, 1976. However, the thrust of these statements implied that Melendez and his brother were regular large heroin dealers.

> The admission of this mass of inadmissible, irrelevant and highly prejudicial testimony unfairly permitted the prosecution to paint Lee and Vaught before the jury as bad men associating with a criminal companion . . . . United States v. Vaught, supra.

Undoubtedly, the events of February 10, 1976, taken in conjunction with Melendez's statement on the 9th of February could justify speculation of a conspiracy on the earlier date. But juries should not be allowed to speculate and a court, in allowing in the hearsay statements, should not bootstrap such statements with the defendant's later conduct, if the conduct itself is insufficient to prove a conspiracy. United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Truslow, 530 F.2d 257, 264 (4th Cir. 1975); Mares v. United States, 383 F.2d 805, 810 (10th Cir. 1967); United States v. Adams, 446 F.2d 681, 683 (9th Cir.), cert. denied, 404 U.S. 943 (1971).

The government failed in its promise to the judge to "connect up" the hearsay of February 9, 1976. Cf. United States v. Green, 523 F.2d 229, 233 n.4 (2d Cir. 1975); Beckwith v. United States, 367 F.2d 458 (10th Cir. 1966). The admission of such hearsay cannot be considered harmless error, United States v. Vaught, supra; United States v. Sansone, 206 F.2d 86 (2d Cir. 1953), and the Court's failure to strike this testimony upon the defendant's request is grounds for reversal. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir.), cert. denied, 397 U.S. 1028 (1969).

II. IT WAS REVERSIBLE ERROR FOR THE COURT TO REFUSE TO APPLY THE "FAIR PREPONDERANCE EVIDENCE" TEST IN DETERMINING WHETHER OR NOT THERE WAS INDEPENDENT EVIDENCE OF A CONSPIRACY ON FEBRUARY 9, 1976.

As set out in section I, defendant maintains that the government failed to prove by a "fair preponderance of the evidence" that a conspiracy involving the defendant was in existence on February 9, 1976. While the circuits have differed as to the correct test to be applied in allowing in co-conspirator hearsay, the Second Circuit has adhered to the "fair preponderance of the evidence" standard. United States v. Cohen, supra at 950; United States v. Geaney, supra; cf. United States v. Vaught, supra ("prima facie proof"); United States v. Adams, supra ("independent evidence"). The Supreme Court has even suggested in dictum that the test is whether or not there is ". . . substantial independent evidence . . . ." United States v. Nixon, supra at 701, n.14.

In the present case, it is clear the Court applied a less rigorous test than any of the above. In discussing the appropriate standard,[2/] the Court simply stated that it expected ". . . that the government will establish a conspiracy, from the evidence, between Melendez and the defendant, Ortiz" (App.

[2/] The Court's remarks to the jury were superfluous and unnecessary. The question of the admissibility of co-conspirator hearsay is one for the court and the court only. United States v. Projansky, supra at 127; United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950), aff'd on other grounds 341 U.S. 495 (1951); United States v. Calabro, 449 F.2d 885, 889 (2d Cir.), cert. denied, 404 U.S. 1047 (1971).

52-53). There was no mention of "fair preponderance" or "substantial independent evidence." The fault here lies not that the Court has incorrectly instructed the jury as to the relevant law, but that the Court itself was employing a lower standard for the admissibility of hearsay. Whether or not the government "connected up" Melendez's hearsay statements of February 9, to the February 10 conspiracy was a close question. While the Court's announced standard is not clear, it implied that any evidence of a conspiracy on the earlier date will suffice. This is not a case where the Court employs a more vigorous standard of admissibility. United States v. Knight, 416 F.2d 1181 (9th Cir. 1969). The loosening of the time-honored threshold question of a fair preponderance of the evidence worked to the detriment of the defendant and was highly prejudicial.

III. THE COURT ABUSED ITS DISCRETION, UNDER FEDERAL RULES OF EVIDENCE 609(a)(1) AND (a)(2), IN DENYING THE DEFENDANT'S MOTION TO EXCLUDE A PRIOR CONVICTION FOR SALE OF HEROIN SINCE ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE.

On July 9, 1976, Defendant Ortiz moved to prohibit the use of his 1972 conviction for the sale of heroin for impeachment purposes. On July 12, 1976, the Court denied this motion.

Impeachment of witnesses by prior convictions is governed by Rule 609 of the Federal Rules of Evidence. It is apparent that the Rule embodies both the policy of encouraging defendants to testify by protecting them against unfair prejudice and the policy of protecting the government's case against unfair misrepresentation of an accused's non-criminality. Under Rule 609(a), Defendant Ortiz's 1972 conviction for the sale of heroin, a crime not involving dishonesty or false statement, is admissible only if the Court determines that its probative value with respect to the defendant's credibility substantially outweighs the prejudice to him.

A. Crimes Involving Dishonesty Or False Statement.

A prior conviction for the sale of heroin cannot be considered under the classification of crimes termed "crimen falsi." In United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976), the court disallowed the impeachment of the defendant who admitted under cross-examination that he had in the past pled guilty to a charge of possession of heroin. The opinion,

quoted from the Joint Explanatory Statement of the Committee of Conference of the House and Senate, which reported out the bill that enacted the Federal Rules of Evidence:

> By the phrase "dishonesty and false statement," the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involved some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. United States v. Millings, supra at 123.

Certainly, it cannot be said that in the instant case, Defendant Ortiz's conviction for sale of heroin is "peculiarly probative of credibility." While it may be argued that any intentional violation of law indicates a disregard for all legal obligations, Congress has not adopted that expansive theory.

B. Probative Value As Opposed To Prejudicial Effect.

Several factors to be considered in this determination were outlined by the Second Circuit in United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968). That court held that a trial judge might exclude evidence of prior convictions if:

> . . . he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly. United States v. Palumbo, supra at 273.

In Palumbo the prior conviction was not excluded for impeachment purposes since the court reasoned that a crime involving fraud and stealing was highly probative on the issue of credibility despite the obvious prejudice. The facts in United States v. Puco, 453 F.2d 539, 542, 543 (2d Cir. 1971), are similar to the ones in the instant case. There, the defendant was convicted of selling cocaine illegally and had a 21-year-old prior conviction for the same offense. While the time span between convictions was noted by the court, it felt that it is better not to establish rigid age limitations on the use of prior convictions for impeachment purposes. Additionally, the court went on to say that:

> The chance of prejudice resulting from admission of prior convictions for crimes similar to the one for which a defendant is on trial may be greatest in the case of narcotics convictions because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders. Ibid. n.9, p. 542.

Ultimately, the court held that ". . . a narcotics conviction has little necessary bearing on the veracity of the accused as a witness."

Recently, in United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975), a federal court excluded a prior conviction for assault in the defendant's trial for armed robbery as long as the defendant refrained from suggesting a "pristine" background on direct examination. The court drew the distinction

between a previous felony conviction for a crime not involving dishonesty or false statement and one which did, and also the very apparent possibility of the resulting prejudice which would far outweigh the probative value of the conviction with respect to the defendant's credibility.

This circuit has considered this issue in United States v. Robinson, No. 76-1153 (2d Cir., Nov. 1, 1976), slip op. 1184. While the decision was based on an interpretation of Rule 403, it is not entirely irrelevant when applied to Rule 609(a). In quoting from Dolan, Rule 403: The Prejudice Rule In Evidence, 49 So. Cal. L. Rev. 220, 233, the court concurred that, "in the interests of more humane and rational trials, courts should resolve all doubts concerning the balance between probative value and prejudice in favor of prejudice." United States v. Robinson, supra n.6 at 5920.

Subsequently, the Robinson opinion discussed the prejudicial effect of admissions and that they must "substantially outweigh" the probative value. "One improper basis of decision that the courts have consistently disallowed concerns attempts to obtain convictions based on the character, personal traits, or generalized bad acts of the defendant, the so-called bad man conviction." Ibid. at 5925.

In United States v. Cook, 538 F.2d 1000 (3d Cir. 1976), the court emphasized the considerations outlined by the Fifth Circuit:

> . . . we must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well . . . . Ibid. at 1003.

To apply these precepts to this case, it must be recognized that there are substantial possibilities that the jury would have harbored strong adverse sensitivity to an admission of a prior narcotics conviction. This creates a significant chance of undue prejudice which can only be overcome by a showing of necessity by the government.

C. Similarity Between Past Crime And The Charged. Crime.

The fact that Defendant Ortiz's prior conviction was similar in nature to the crime he stood trial for is additionally dispositive that it should have been excluded.

In Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968), the court held that:

> Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime, because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." Ibid. at 940.

In United States v. Brown, 409 F. Supp. 890, 893, 894 (W.D.N.Y. 1976), a federal court dealt with a fact situation almost identical to the present case. There, the prior crime was a relatively recent sale of narcotic drugs, and the new

indictment was for distributing heroin. The court said:

> When . . . the prior crime parallels that for which the defendant witness is being tried, the quantum of prejudice to the defendant is magnified and, when the prior crime embodies falsification or fraud or stealing (not the situation now presented), it has great probity concerning credibility. United States v. Brown, supra at 893-894.

The Brown court distinguished the holdings in Palumbo cited supra and United States v. DiLorenzo, 429 F.2d 216 (2d Cir. 1970), since those convictions involved fraud and stealing--crimes which bear directly on credibility, and moreover those convictions did not involve crimes similar to the ones for which the defendants were on trial.

Finally, the court held "that an old narcotics conviction has but little bearing re credibility of a witness but possesses great prejudice to a defendant-witness charged with a parallel criminal charge."

D. Importance of Defendant's Testimony.

The importance of the defendant's testimony is one of the factors that have to be weighed if the prior convictions are to be admissible. When the prior convictions are not relevant to credibility and the risk of prejudice is great, it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.

The far more prejudicial effect that knowledge of a defendant's prior conviction has on a jury has been statistically

recognized in a study done by Kalven and Zeisel, The American Jury 160 (1966). The data indicated that when a defendant's criminal record is known and the prosecution's case has contradictions the defendant's chances of acquittal are 38%, compared to 65% otherwise. In addition, the inability of the government's informant to identify the defendant's wife, allegedly present when the transaction occurred, and his inconsistent grand jury and trial testimony (Tr. 90-100), certainly raised questions of credibility that could only be effectively countered by allowing the defendant to testify without regard to his prior conviction. If, the case is going to be determined largely upon a one-on-one testimony with credibility being an important factor, the admission of an earlier conviction would be highly prejudicial. United States v. Brown, supra at 892.

In the situation here, when weighing the importance to the defendant of being able to testify against the highly prejudicial and inflammatory effect that introduction of his similar prior conviction would have on the jury, and its relatively little probative value, this court can reasonably conclude that Defendant Ortiz's motion to suppress his prior conviction should have been granted.

Defense counsel could have been restricted to not alluding to the defendant's character as being "pristine" in nature or suggesting that he had never been convicted of a felony, and thereby not create a false image of the defendant to the jury.

It is respectfully submitted that the trial judge abused his discretion in not suppressing the defendant's prior narcotics conviction since it is not a crime involving dishonesty or false statement and its certain prejudice far outweighed any probative value regarding the defendant's credibility.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the judgment of conviction be vacated and that the case be remanded for a new trial.

Respectfully submitted,

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Dated Nov. 29, 1976

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the Appellant's Brief and Appendix were mailed to Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 29th day of November, 1976.

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